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MEDIATION: THE FLORIDA LEGISLATURE GRANTS JUDICIAL IMMUNITY TO COURT-APPOINTED MEDIATORS

J. SUE RICHARDSON

FLORIDA is leading the way in the establishment of alternative dispute resolution procedures. As foretold by the Supreme Court of Florida, the Legislature has attempted "to accommodate the resolution of individual disputes without the use of the judiciary in areas where other forums or procedures can readily provide adequate dispute adjustment."¹ In 1987, the Florida Legislature passed comprehensive court-annexed mediation and arbitration statutes.² In 1989, to ensure the participation of qualified persons as mediators and arbitrators, the Florida Legislature passed a bill granting absolute judicial immunity to court appointed mediators and arbitrators.³ While the legislative combination of mediation and judicial immunity is a recent phenomenon, both concepts are deeply rooted in history. This Comment examines the historical background of both concepts, but will concentrate on how the Legislature combined the two in the 1989 statute. This foundation will provide the context for an analysis of the Legislature's power to take such action in light of state and federal constitutional guarantees of the right of access to the courts.

I. BACKGROUND

Mediation is deeply rooted in the history and tradition of many lands and cultures.⁴ Recently the United States Congress revived this ancient medium of dispute resolution by passing the Dispute Resolution Act of 1980.⁵ Alternative dispute resolution procedures have been touted as the savior of a court system drowning in a flood of litigation and as the gateway for a majority of Americans to resolve minor dis-

1. Carter v. Sparkman, 335 So. 2d 802, 807 (Fla. 1976).

2. FLA. STAT. ch. 44 (1989).

3. Ch. 89-31, § 5, 1989 Fla. Laws 48, 50 (codified at FLA. STAT. § 44.307 (1989)).

4. J. FOLBERG & A. TAYLOR, *MEDIATION* 1-7 (1984). Mediation predates litigation. *Id.* As one author has noted, "Mediation may not be the oldest profession, but it surely must be close." Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 734 n.21 (1984) (quoting D. KOLB, *THE MEDIATORS* 1 (1984)).

5. Dispute Resolution Act of 1980, 28 U.S.C. app. II (West 1980).

putes in an expeditious and cost-effective manner.⁶ "The notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and as inexpensively as possible."⁷

While mediation is of ancient lineage, its structure resists codification through rules and procedures. Part of the difficulty with establishing a clear definition is the perception that mediation is a process which is defined by the nature of the dispute and the parties involved.⁸ Mediation is "a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement."⁹ Mediation is a problem-solving process which empowers conflicting parties, who often must maintain a future relationship,¹⁰ to resolve their own disputes. Mediation is short-term and interactive, focusing on the issues in dispute, not on underlying emotional problems.¹¹

Mediation begins with the mediator fostering an atmosphere of confidence and trust in the process.¹² A mediator aims to "reorient the parties toward each other" and the problem,¹³ directing them away from their adversarial positions and allowing them to attack the problem, instead of each other. Through the use of interactive communication skills, a mediator determines the facts, isolates the contested issues, and selects those issues that are negotiable.¹⁴ The mediator then creates and explores settlement options and nudges the parties toward a mutual agreement. In some settings, the mediator drafts the agreement and presides over its signing.

6. See, e.g., Christian, *Community Dispute Resolution: First-Class Process or Second-Class Justice?*, 14 N.Y.U. REV. L. & SOC. CHANGE 771, 771-72 (1986).

7. *Id.* at 772 (quoting address by Chief Justice Warren E. Burger, American Bar Association National Conference (Feb. 1982)).

8. J. FOLBERG & A. TAYLOR, *supra* note 4, at 7.

9. FLA. STAT. § 44.301(1) (1989).

10. Chaykin, *supra* note 4, at 733-34.

11. J. FOLBERG & A. TAYLOR, *supra* note 4, at 8.

12. *Id.* at 38-40.

13. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91 (1981) (quoting Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)). See generally R. FISHER & W. URY, *GETTING TO YES* 17-40 (1981) (discussing transition from adversarial party posturing to a problem-solving approach).

14. J. FOLBERG & A. TAYLOR, *supra* note 4, at 38-62; see also, Stulberg, *supra* note 13, at 88-94 (discussing the mediation process and its functions); Chaykin, *supra* note 4, at 735 (outlining a six-step process used to achieve mediators' goals).

Mediation differs from arbitration in its informal¹⁵ and voluntary nature.¹⁶ Arbitration is patterned on the courtroom model,¹⁷ using procedural rules for hearing disputes, and rendering decisions that may be binding upon the parties.¹⁸ "[I]n [some] important respects an arbitrator simply is a substitute judge."¹⁹ A mediator, unlike an arbitrator or a judge, does not compel the parties to abide by the rules of conduct or law as interpreted by the decisionmaker, but rather persuades them to conform to social norms of conduct they themselves acknowledge.²⁰ A mediator draws on the trust of the parties rather than on the force of law in assisting the parties to reach a mutual agreement.²¹ In light of these significant differences, should a mediator be granted the same broad immunity as judges and arbitrators? This question recently has been addressed by authorities in the field and by the Florida Legislature.²²

A. Mediator Liability

There have been few claims against mediators and no reported cases where a claimant has prevailed against one. The paucity of suits may be due to the facts that mediation is not widely used²³ and that most participants are satisfied with their mediation experience.²⁴ As the popularity of mediation spreads, the potential for an increase in litigation against mediators by dissatisfied parties will increase.²⁵ Several different legal theories for actions against mediators have been prof-

15. FLA. STAT. § 44.301(1) (1989).

16. Stulberg, *supra* note 13, at 88-89.

17. Chaykin, *supra* note 4, at 734.

18. *Id.*

19. *Id.* Chapter 682, Florida Statutes, provides for arbitration procedures similar to those used in a judicial proceeding, including the control of the hearing, issuance of subpoenas, imposition of a decision and the existence of an appeal process. FLA. STAT. ch. 682 (1989).

20. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971); see, e.g., Roehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES 161, 168 (1985) (delineating three positive qualities of mediation: more flexible solutions, avoidance of the winner-loser phenomenon, and the shift of focus away from the judge to the subject matter of the dispute); Comment, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876, 1876-77 n.5 (1986) (characterizing mediators as mere intermediaries "lack[ing] authority to dictate the substantive outcome of a dispute").

21. Chaykin, *supra* note 4, at 734.

22. See *id.* at 731-64; Comment, *supra* note 20, at 1876; Ch. 89-31, § 5, 1989 Fla. Laws 48, 50 (codified at FLA. STAT. § 44.307 (1989)).

23. J. FOLBERG & A. TAYLOR, *supra* note 4, at 281.

24. *Id.*; see also Roehl & Cook, *supra* note 20, at 163. Disputing parties gave mediation high ratings for quality of settlement, fairness of process, and the role of the mediator. Studies have shown that mediation settlements are more likely to be abided by as compared to adjudication in small claims, divorce and custody cases. *Id.*

25. Chaykin, *supra* note 4, at 732; J. FOLBERG & A. TAYLOR, *supra* note 4, at 281-82.

ferred, based on tort,²⁶ contract,²⁷ and breach of fiduciary duty.²⁸ Each of these legal theories, however, must surmount the difficulty of proving a breach of duty and damages before a mediator can be found liable.²⁹

A tort action in the mediation context requires proof of four elements: "a duty owed to the participants by the mediator; a breach of the duty by failure to comply with acceptable standards of practice; damages measurable in money; and a causal relationship between the failure to exercise an acceptable standard of practice and the alleged damages."³⁰ One difficulty of proving these elements lies in the lack of professional standards for mediators.³¹ Proving damages is similarly precarious, as disgruntled participants must estimate what they would have obtained in another resolution procedure or what economic consequences were the unique result of the mediation.³²

Contract damages rely on proof of a breach of an expressed or implied contractual duty.³³ For a mediator to be held liable under a contract theory, she would have to promise substantive results or procedural safeguards, such as absolute confidentiality³⁴ or fairness in

26. J. FOLBERG & A. TAYLOR, *supra* note 4, at 281 (listing "fraud, false advertising, . . . invasion of privacy, defamation, . . . and professional negligence or malpractice"); Chaykin, *supra* note 4, at 736 (arguing that the lack of clearly defined standards as to mediator duties makes it almost impossible to establish the elements of a tort); Comment, *supra* note 20, at 1891-94 (discussing a common law tort suit in light of the difficulty of obtaining proof of proximate cause in the mediation setting).

27. J. FOLBERG & A. TAYLOR, *supra* note 4, at 281-83; Chaykin, *supra* note 4, at 737 (stating that the usual vagueness of a mediated contract limits its usefulness as a source of client rights); Comment, *supra* note 20, at 1886-88 (positing a contractual model with a mediator's duty being to ensure a procedural process that eliminates unconscionable practices and inequality of bargaining power).

28. J. FOLBERG & A. TAYLOR, *supra* note 4, at 281; Chaykin, *supra* note 4, at 738. Chaykin suggests that the law of fiduciary duty is the most useful of the legal theories because of its flexibility:

[I]t does not depend on the availability of a predefined legal standard, as does the law of negligence, nor does it require a contract. Although a contract may aid in ascertaining whether a fiduciary relationship exists, fiduciary duties may be imposed where there is no contractual agreement to abide by the duty, or even where there is a contractual provision that purports to dispense with the duty.

Id. (footnotes omitted).

29. J. FOLBERG & A. TAYLOR, *supra* note 4, at 281-86 (discussing proof in context of contract liability and medical malpractice); Comment, *supra* note 20, at 1883-86.

30. J. FOLBERG & A. TAYLOR, *supra* note 4, at 283.

31. *Id.*

32. *Id.* at 285-86; see *Lange v. Marshall*, 622 S.W.2d 237, 239 (Mo. Ct. App. 1981) (finding causation and damages problems insurmountable).

33. J. FOLBERG & A. TAYLOR, *supra* note 4, at 281-83.

34. *Id.* at 282.

the process.³⁵ A contract for mediation services can be crafted to avoid either of these potential pitfalls.

The fiduciary model also poses obstacles to a successful law suit. First, a mediator's duty must be defined. One commentator has suggested that such a definition should include the duties of being "even-handed and unbiased, trustworthy and diligent."³⁶ It is problematic to apply this model, which is predicated upon the professional, well-compensated role of fiduciaries in our society (i.e., bankers, stock-brokers and realtors)³⁷ to mediators, who are, in most cases, uncompensated volunteers.³⁸ Holding volunteer mediators to fiduciary liability imposes a risk without a countervailing benefit and hence discourages the expansion of the mediation concept.³⁹ The lack of clearly defined standards and models of professional conduct also hampers this approach. However, difficulties are not necessarily impossibilities. Most would agree that some level of accountability is needed to make the process reliable.⁴⁰

B. Immunity

The Florida Legislature has granted broad immunities to court-appointed mediators.⁴¹ Yet one commentator has suggested that mediators should not enjoy the same broad immunities as do arbitrators and judges because mediators do not rely on legal precedent in imposing a decision on the parties.⁴² As a result, this commentator concludes, mediators do not merit the "extraordinary protection from reprisal offered by formal immunities."⁴³

35. For a discussion of the potential effect of imposing a substantive responsibility model on mediator liability, see Comment, *supra* note 20, at 1884-86. The threat of a law suit and the misconception of the mediator's role in quasi-judicial terms of "fairness" as the guardian of public policy, would both tend to undermine the evolution of mediation and require the mediator to distance himself from the very settlement agreement he has helped author. *Id.*

36. Chaykin, *supra*, note 4, at 749. Chaykin offers the following examples of possible breaches: (1) advising a divorcing party that a cash settlement payment has the same tax consequences as alimony or support payments; (2) unnecessarily causing one party to feel "insecure, undermined or guilty"; and (3) failing to inform parties to a divorce that their property may be more valuable than they estimate. *Id.* at 747-48 nn.78-80.

37. Comment, *supra* note 20, at 1883-84; cf. Dobranski, *The Arbitrator as a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U.L. REV. 65 (1982) (arguing that the creation of fiduciary status for arbitrators with its resultant liability would have a chilling effect on arbitrators' willingness to participate in arbitration).

38. Comment, *supra* note 20, at 1883-84.

39. *Id.*

40. *Id.* at 1895.

41. Ch. 89-31, § 5, 1989 Fla. Laws 48, 50 (codified at FLA. STAT. § 44.307 (1989)).

42. Chaykin, *supra* note 4, at 732.

43. *Id.* at 733.

1. Judicial Immunity

Judicial immunity has been "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."⁴⁴ In 1872, the United States Supreme Court first recognized the doctrine of judicial immunity in *Bradley v. Fisher*,⁴⁵ enumerating five reasons for granting absolute immunity to judges: 1) a judge must be free to act upon his own convictions without fear of personal liability; 2) the adversarial nature of the process and the potential for great economic and emotional loss make it likely that the loser will not only blame the judge for making a wrong decision but also ascribe to him improper motives for doing so; 3) judges, faced with the threat of a law suit, would be driven to inefficient self-protective measures, such as excessive record-keeping; 4) appeal and impeachment remedies provide alternative means of redress to replace the loss of action against a judge; and 5) qualified immunity based on "good faith" would be virtually worthless in the face of suits brought alleging "bad faith" as the judge would still have to prepare a defense.⁴⁶ Add to this a sixth reason: judgments need to be final.⁴⁷

Judicial immunity, however, is not absolute. The Court in *Bradley* recognized a limit to this protection by stressing that when a judge acts in the "clear absence of *all* jurisdiction," judicial immunity could not be invoked.⁴⁸ Courts have broadly construed "jurisdiction," thereby rendering this limitation form without substance.⁴⁹

In a few limited instances, Florida courts have found a judge's actions to be outside the court's jurisdiction. In 1942, the Supreme Court of Florida determined that court-appointed psychiatrists, who failed to examine a woman prior to issuing a report of insanity, acted

44. *Bradley v. Fisher*, 80 U.S. (1 Wall.) 335, 347 (1872). For a thorough examination of the historical roots of judicial immunity, see *Pulliam v. Allen*, 466 U.S. 522, 529-536 (1984).

45. 80 U.S. (1 Wall.) 335 (1872).

46. *Id.* at 347-54.

47. See *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985), *cert. denied*, 479 U.S. 984 (1986).

48. *Bradley*, 80 U.S. (1 Wall.) at 351-52 (emphasis added).

49. See *Stump v. Sparkman*, 435 U.S. 349 (1978) (characterizing a judge's decision as a judicial act for which he was immune even though no "case" had been instituted); *Holloway*, 765 F.2d at 524 (regarding a judge, who continued to hear a case without sufficient jurisdiction to conduct the proceedings pursuant to a court of appeal's order to desist); *Gay v. Heller*, 252 F.2d 313, 314 (5th Cir. 1958) (noting that "the normal way to correct errors in the trial or other disposition of a law suit is by appeal, not by suing the judge"); *McDaniel v. Harrell*, 81 Fla. 66, 87 So. 631 (1921) (involving a mayor, acting in his judicial capacity, who had a storekeeper arrested for violation of the city "blue laws" and subsequently incarcerated for refusal to pay the fine); *id.* at 67, 87 So. at 632 (regarding an erroneous decision as to whether the court had jurisdiction over the case).

wholly without jurisdiction, as they had not obtained jurisdiction over her person.⁵⁰ Ten years later, the supreme court held that judicial immunity did not apply to a judge who had ordered the rearrest of a plaintiff freed on a writ of habeas corpus.⁵¹ The court reasoned that a judge acting without jurisdiction acted without authority of law and was no more than an "individual falsely assuming an authority he [did] not possess."⁵²

In a 1964 case, *Waters v. Ray*,⁵³ Harold Waters appeared before Judge Hollis Ray on a traffic violation. After a whispered conversation with the prosecutor during a recess, Judge Ray ordered Waters arrested for not having a valid driver's license.⁵⁴ On the grounds that the arrest charge was a nullity—no existing law required a citizen to have a valid driver's license—the First District Court of Appeal found that Judge Ray acted wholly without jurisdiction and, therefore, without immunity.⁵⁵

The appellate court in *Waters* relied on *Rammage v. Kendall*,⁵⁶ where a judge ordered the arrest of a witness who, while testifying on behalf of the defendant, stated that he had had sexual intercourse with the plaintiff one year earlier. The court in *Rammage* held that judicial immunity did not apply to acts taken without authority. The judge in *Rammage* had not obtained jurisdiction over the witness or the subject-matter of his arrest; no charge had been filed against him and the statute of limitations had run.⁵⁷ The court stated that to hold otherwise "would be to deny to a citizen, absolutely, his constitutional right to have his day in court and due process of law."⁵⁸

The court system obtains the necessary freedom of action for its officers through the broad grant of immunity; the system does not

50. *Beckham v. Cline*, 151 Fla. 481, 10 So. 2d 419 (Fla. 1942).

51. *Farish v. Smoot*, 58 So. 2d 534, 537 (Fla. 1952).

52. *Id.* at 538, stating that:

[t]he reason for the rule is stated in *Cooley on Torts* (3d ed.), pages 805, 806, as follows: "A judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his recognizance, or cases between persons who are not, either actually or constructively, before him for the purpose."

Farish, 58 So. 2d at 538.

53. 167 So. 2d 326 (Fla. 1st DCA 1964).

54. *Id.* at 328.

55. *Id.* at 330.

56. 168 Ky. 26, 181 S.W. 631 (Ky. Ct. App. 1916).

57. *Id.* at 34-35, 181 S.W. at 635.

58. *Id.* at 32, 181 S.W. at 634.

benefit when an officer violates a person's constitutional or statutory rights by taking action outside the authority of his office.⁵⁹ Determining whether a judicial officer's conduct falls within his official scope of duty is elusive. The United States Supreme Court, seeking to provide some guidance, has stated that a judicial act is defined by the nature of the act itself.⁶⁰ According to the Court, such an inquiry should consider whether the act was "a function normally performed by a judge, and . . . the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."⁶¹ The Fifth Circuit Court of Appeals has appended three additional factors: whether the act occurred within the courtroom or judge's chambers, in the context of a case pending before the judge, and during a visit to the judge in his official capacity.⁶²

The United States Supreme Court and the Fifth Circuit Court of Appeals further clarified the role of judges in later decisions, distinguishing between administrative decisions made in the hiring and firing of employees⁶³ and certain other types of administrative decisions, which were judicial in nature.⁶⁴ The Fifth Circuit implied that judges might enjoy quasi-judicial immunity for executive and legislative functions they perform.⁶⁵ Cautioning against defining a judge's role too narrowly, the court asserted that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities."⁶⁶ According to the Second Circuit,

[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.⁶⁷

Courts have used this standard to determine whether an officer's acts were discretionary and, therefore, entitled the officer to absolute im-

59. *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 688 (5th Cir. 1985).

60. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

61. *Id.*

62. *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972).

63. *Forrester v. White*, 484 U.S. 219, 228-30 (1988) (finding that a judge had no immunity against a probation officer's claim of wrongful discharge under 42 U.S.C. § 1983 (1982)).

64. *Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir. 1985) (administering a business, a school district, or a prison system).

65. *Id.* at 525.

66. *Id.* at 524 (quoting *Butz v. Economou*, 438 U.S. 478, 511 (1978)) (stating that the occurrence of some acts outside the courtroom did not render them non-judicial).

67. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

munity.⁶⁸ Under this analysis, the United States Supreme Court has extended absolute immunity, in the form of quasi-judicial immunity, to a variety of governmental officers, including the President,⁶⁹ prosecutors,⁷⁰ legislators,⁷¹ legislative aides⁷² and administrative officials in the Department of Agriculture.⁷³

In *Butz v. Economou*,⁷⁴ the United States Supreme Court set forth the following two-part test for determining the need for absolute immunity: if the official's function is judicial in nature, and a disgruntled party's constitutional rights are protected by safeguards built into the regulatory framework, then the officer's conduct will be immune from civil liability.⁷⁵ Arguably, court-appointed mediators would qualify for immunity under the *Butz* test. Even though mediators have no decisional authority, they conduct quasi-judicial settlement hearings and are open to civil damage claims. Furthermore, the parties' constitutional rights are protected by their power to refuse settlement and continue with the suit. As has been explained, judicial immunity is so broad as to be referred to as "absolute." However, as the United States Supreme Court held in *Pulliam v. Allen*,⁷⁶ judicial immunity does not insulate judges from actions brought under section 1983 of the Civil Rights Act.⁷⁷ Allen filed a section 1983 claim for injunctive relief against United States Magistrate Gladys Pulliam for her practice of incarcerating individuals awaiting trial for nonincarcerable offenses.⁷⁸ The district court granted a prospective injunction against the magistrate and awarded costs and attorney's fees according to section 1988.⁷⁹ The Supreme Court upheld the lower court's decision.⁸⁰

68. See *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 688 (5th Cir. 1985).

69. See *id.* (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)).

70. See *id.* (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

71. See *id.* (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)).

72. See *id.* (citing *Gravel v. United States*, 408 U.S. 606 (1972)).

73. See *id.* (citing *Butz v. Economou*, 438 U.S. 478 (1978)).

74. 438 U.S. 478 (1978).

75. *Id.* at 510-13 (noting that grand jurors, prosecutors, advocates, witnesses and jurors fall within the scope of judicial acts).

76. 466 U.S. 522 (1984).

77. *Id.* at 541 (citing 42 U.S.C. § 1983 (1982)). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

78. *Pulliam*, 466 U.S. at 525.

79. 42 U.S.C. § 1988 (1982). This section grants such costs to successful parties in section 1983 claims.

80. *Pulliam*, 466 U.S. at 544.

The Supreme Court reviewed section 1983 in relation to Pulliam's claim that judicial immunity barred an award of injunctive relief under section 1983 and, therefore, an award of attorney's fees under section 1988.⁸¹ Because judicial immunity was available at common law but injunctive relief was not, the Court turned to legislative history to determine congressional intent.⁸² The Court found that Congress did not intend to expand the common law doctrine of judicial immunity to insulate judges from prospective injunctive relief under the Civil Rights Act.⁸³ Notwithstanding Pulliam's argument that attorney's fees, like civil damage awards, would have an inhibiting effect on a judge's independence of action, the Court determined that Congress clearly intended these fees to be available in a successful section 1983 claim.⁸⁴

Granting mediators the same immunity enjoyed by judges is tantamount to granting them absolute immunity. As noted above, judicial immunity is a successful defense except: where the judge acts "wholly" outside the court's jurisdiction over the subject-matter or the person; where the action taken is not "judicial"; and where prospective injunctive relief with accompanying attorney's fees are awarded pursuant to an action brought under the Civil Rights Act.

The Florida Legislature has granted this essentially absolute immunity to court-appointed mediators. Yet the exceptions to judicial immunity described above will likely never arise in the mediation context. Because jurisdiction is determined by the judge prior to ordering mediation⁸⁵ and both parties or their appointed representatives must be present for an agreement to be reached, it is highly unlikely that a mediator can be found to have acted without jurisdiction. In addition, the role of a mediator, though arguably not decisional in nature, is similar to a judge's role in assisting parties to reach a settlement. In this respect, the functions of mediators are well within the definition of judicial acts.⁸⁶ Finally, unlike a judge, a mediator has no

81. *Id.* at 527.

82. *Id.* at 540.

83. *Id.* at 540-41; *cf.* *Pierson v. Ray*, 386 U.S. 547, 549 (1967). A municipal police justice jailed civil rights demonstrators for a breach of the peace after they were arrested for attempting to use segregated facilities in a bus terminal. The Supreme Court upheld the district court application of judicial immunity, stating that Congress had not intended to abolish the common law right of judicial immunity under section 1983. *Id.* at 544.

84. *Pulliam*, 466 U.S. at 543.

85. FLA. STAT. § 44.302 (1989) (providing for court referral of any contested civil action filed in a circuit court over which the court has jurisdiction).

86. *See Carter v. Sparkman*, 335 So. 2d 802, 808 (Fla. 1976) (characterizing the responsibilities of judges assigned to medical malpractice mediation panels as "judicial duties"), *cert. denied*, 429 U.S. 1041 (1977).

authority to bind the parties to their agreement; a court must approve it.⁸⁷ Therefore, injunctive relief and the accompanying attorney's fees provision of section 1988 would be inapplicable against a mediator. Thus, in Florida court-appointed mediators now enjoy *absolute* immunity for their acts.

2. Mediator Immunity

The question of mediator immunity has been addressed statutorily by thirteen states other than Florida and arisen in only two reported cases. Each of the thirteen states has granted some form of immunity to mediators.⁸⁸ These state legislatures have apparently acted in the absence of any perceivable threat of litigation. As of this writing, only two cases have been reported claiming civil damages for alleged injuries caused by a mediator.

In *Lange v. Marshall*,⁸⁹ an attorney mediated a divorce settlement for two friends. After signing the agreement, the wife filed an action for negligence in the attorney's representation of her interests, claiming he failed to advise her that she could get a better settlement.⁹⁰ After hiring another attorney, the wife settled out of court for a larger

87. FLA. R. CIV. P. § 1.730(c).

88. **Colorado:** COLO. REV. STAT. § 13-22-305 (Supp. 1988) (limiting qualified immunity to willful or wanton misconduct); **Iowa:** IOWA CODE § 679.13 (1987) (limiting immunity to actions by dispute resolution center mediators made "in bad faith, with malicious purpose or in a manner exhibiting willful and wanton disregard of human rights, safety or property"); **Maine:** ME. REV. STAT. ANN. tit. 4, § 18(2-A) (1964) and tit. 14, § 8111(1) (Supp. 1988) (providing immunity for negligent performance of ministerial acts or discretionary functions by mediators under contract with the judicial department); **Minnesota:** MINN. STAT. ANN. § 583.26(7) (West 1988) (providing immunity for actions within the scope of farm-lender mediation panel); **Mississippi:** MISS. CODE ANN. § 69-2-49 (Supp. 1988) (providing immunity for actions within the scope of the farm debt mediation services); **Montana:** MONT. CODE ANN. § 27-6-106 (1987) (providing absolute immunity for medical malpractice mediators); **New Jersey:** N.J. REV. STAT. § 2A:23A-9(d) (1987) (providing immunity for wrongful conduct of a dispute resolution umpire); **North Carolina:** N.C. GEN. STAT. §§ 1-539.10 to -539.11 (Supp. 1988) (limiting qualified immunity to uninsured volunteer mediators serving with uninsured non-profit charitable organizations); **Oklahoma:** OKLA. STAT. ANN. tit. 12, § 1805(E) (West Supp. 1989) (providing immunity for "gross negligence with malicious purpose or . . . willful disregard of the rights, safety, or property of any party to the mediation"); **Virginia:** VA. CODE ANN. § 8.01-581.23 (Supp. 1988) (limiting qualified immunity to acts or omissions done or made in good faith during mediation); **Washington:** WASH. REV. CODE ANN. § 7.75.100 (Supp. 1989) (limiting qualified immunity to dispute resolution center directors and mediators acting in good faith); **Wisconsin:** WISC. STAT. ANN. § 93.50(2)(c) (West Supp. 1988) (providing immunity for any acts or omissions within the scope of Department of Agriculture, Trade and Consumer Protection mediation duties); **Wisconsin:** WISC. STAT. ANN. § 655.465(6) (West Supp. 1988) (limiting qualified immunity to medical malpractice mediators acting in good faith); **Wyoming:** WYO. STAT. § 11-41-105 (Supp. 1989) (limiting qualified immunity to mediators under agricultural mediation services acting in good faith).

89. 622 S.W.2d 237 (Mo. Ct. App. 1981).

90. *Id.* at 238.

amount.⁹¹ The original attorney successfully defended the suit on the grounds that he was acting in his capacity as a mediator and was obligated to remain impartial toward both parties.⁹² Even accepting the proposition that the attorney was negligent, the Missouri Court of Appeals held that the wife had failed to establish damages.⁹³

*Mills v. Killebrew*⁹⁴ involved a due process and equal protection action under the Civil Rights Act⁹⁵ brought by winners of a forced mediation hearing. Under Michigan law, a court could submit any civil case alleging monetary damages to mediation.⁹⁶ The mediation panel awarded damages to the appellants, who were deemed to have accepted the award by their failure to reject it under the rules.⁹⁷ Finding that mediators were entitled to judicial immunity because they performed a quasi-judicial function, the district court dismissed the ensuing suit.⁹⁸ The appellants argued that the use of mediation panels was unconstitutional in Michigan, that the mediators acted without jurisdiction, and that the mediators therefore were not entitled to judicial immunity.⁹⁹ Affirming the district court's decision, the Sixth Circuit Court of Appeals found both constitutional and statutory support for the use of mediation panels and the grant of immunity to the mediators.¹⁰⁰

The mediators' role in *Mills* was similar to that of arbitrators because they evaluated the case and proposed an award. Under the local rules, if one of the parties opted for a trial *de novo*, but did not obtain a better award, the court could impose sanctions.¹⁰¹ Since this resembles Florida's court-ordered non-binding arbitration program more than it does Florida's mediation program,¹⁰² it is difficult to see what effect, if any, this case would have in a claim against a mediator in Florida.

Statutory and case law support quasi-judicial immunity for mediators. When a mediator acts outside the scope of his quasi-judicial duties, difficulties arise. Unlike judges, mediators have no professional code of conduct clearly delineating their procedural and ethical duties.

91. *Id.*

92. *Id.* at 239.

93. *Id.* at 238.

94. 765 F.2d 69 (6th Cir. 1985).

95. 42 U.S.C. § 1983 (1982).

96. *Mills*, 765 F.2d at 70 (citing MICH. WAYNE COUNTY CIR. CT. R. § 403).

97. *Id.* at 71.

98. *Id.*

99. *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)).

100. *Id.* at 72.

101. *Id.* at 70-71.

102. See FLA. STAT. § 44.303 (1989).

The Supreme Court of Florida has not promulgated rules of conduct for court-appointed mediators, although the court is expected to do so by 1990. Florida courts faced with the allegation of a mediator acting outside the scope of his judicial role have little to rely on other than the few procedural duties expressed in the Florida Statutes and supreme court rules.

II. PRESENT SITUATION

In recent years, the Florida Legislature and the Supreme Court of Florida have implemented laws and corresponding rules for mediation and other alternative dispute resolution processes. This strong commitment to alternative dispute resolution resulted in chapter 44, Florida Statutes, a comprehensive mediation and arbitration program.¹⁰³ This legislation provides for court-ordered mediation for family disputes,¹⁰⁴ the establishment of citizen dispute centers,¹⁰⁵ court-ordered mediation,¹⁰⁶ non-binding arbitration¹⁰⁷ and voluntary binding arbitration for private parties.¹⁰⁸ In compliance with these laws, the supreme court has promulgated rules regarding the many aspects of such alternative forms of dispute resolution and included them in the Florida Rules of Civil Procedure.¹⁰⁹ The supreme court has also promulgated corresponding rules for implementing court-ordered non-binding arbitration¹¹⁰ and voluntary binding arbitration.¹¹¹

In addition to the general authorization of arbitration and mediation contained in chapter 44, Florida Statutes, the Legislature has also authorized private contractual arbitration,¹¹² international contract dispute resolution,¹¹³ consumer mediation,¹¹⁴ labor law mediation,¹¹⁵

103. FLA. STAT. ch. 44. (1989).

104. *Id.* § 44.101.

105. *Id.* § 44.201.

106. *Id.* § 44.302.

107. *Id.* § 44.303.

108. *Id.* § 44.304.

109. Promulgated rules include those regarding court referral of cases to mediation and arbitration, FLA. R. Civ. P. § 1.700; the conducting of mediation, *id.* § 1.710; mediation procedures for sanctioning non-appearance, presence of counsel, and private caucusing with parties, *id.* § 1.720; the reporting of the agreement or lack thereof to the court without comment by the mediator, *id.* § 1.730(a); court review and approval of the agreement, *id.* § 1.730(c); the qualifications, training, and duties of mediators, *id.* §§ 1.760-1.780; and the mediation of small claims matters, *id.* § 1.750.

110. *Id.* §§ 1.800-1.820.

111. *Id.* § 1.830.

112. FLA. STAT. ch. 682 (1989).

113. *Id.* ch. 684.

114. *Id.* § 570.544(3).

115. *Id.* § 448.06.

medical malpractice arbitration,¹¹⁶ lemon law dispute resolution,¹¹⁷ voluntary private condominium dispute arbitration,¹¹⁸ and mobile home dispute resolution.¹¹⁹ Throughout the state, forty-five programs operate under this legislation: twenty county citizen dispute and small claims programs, eleven circuit court family mediation programs, and fourteen circuit court non-family dispute programs.¹²⁰

Until the 1989 session, the Legislature had granted immunity to mediators and arbitrators in only two specific instances—qualified immunity to mediators in citizen dispute centers¹²¹ and immunity to arbitrators in international arbitration cases.¹²² The contemporaneous Senate Staff Analysis of the bill proposing absolute immunity for mediators pointed out that there existed no Florida case law determining whether mediators should be afforded quasi-judicial status and the absolute immunity which accompanies it.¹²³ Moreover, a first draft of the Senate Staff Analysis stated that “[t]here have been instances in Florida, and other jurisdictions, in which arbitrators and mediators . . . have been sued by unhappy litigants.”¹²⁴ The 1989 Annual Report prepared by the Senate Judiciary-Civil Committee at the direction of the Senate President recommended the extension of absolute immunity to arbitrators and mediators in their roles as quasi-judicial officers to prevent harassment from suits brought by disappointed litigants.¹²⁵ The report concluded that existing laws and rules pertaining to arbitration and mediation provided sufficient safeguards to

116. *Id.* § 766.207.

117. *Id.* § 681.108.

118. *Id.* § 718.112(2).

119. *Id.* § 723.037(4).

120. Staff of Fla. H.R. Comm. on Judiciary-Civ., HB 884 (1989) Staff Analysis 1 (rev. April 18, 1989) (final draft on file with committee).

The following circuits/counties have established court-annexed mediation programs: 1st Circuit/Escambia and Okaloosa Counties; 2d Circuit/Leon County; 11th Circuit/Dade County; 13th Circuit/Hillsborough County; 17th Circuit/Broward County; 18th Circuit/Brevard County; and 20th Circuit/Charlotte, Lee and Collier Counties. J. STULBERG, COUNTY COURT MEDIATION: A MEDIATOR'S MANUAL 4 (May, 1989) [hereinafter A MEDIATOR'S MANUAL] (available at Dispute Resolution Center, Florida State University College of Law).

121. FLA. STAT. § 44.201(6) (1989) (providing qualified immunity for any acts or omissions in the scope of employment unless made in “bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another”).

122. *Id.* § 684.35.

123. Staff of Fla. S. Comm. on Judiciary-Civ., CS for SB 155 (1989) Staff Analysis 4 (rev. April 4, 1989) [hereinafter Judiciary-Civ. Comm. SB 155 Staff Analysis] (on file with committee).

124. Staff of Fla. S. Comm. on Judiciary-Civ., SB 237 (1989) Staff Analysis 1 (Feb. 17, 1989) (on file with committee).

125. STAFF OF FLA. S. COMM. ON JUDICIARY-CIV., ANNUAL REPORT, 82-83 (Mar. 23, 1989) (on file with committee).

protect participants from unlawful conduct by mediators and arbitrators.¹²⁶

III. LEGISLATION

The comprehensiveness of its legislation has thrust Florida to the forefront of court-annexed dispute resolution programs.¹²⁷ Florida's first Citizen Dispute Settlement Center opened in Dade County in 1975, followed by the first mediation program in Broward County.¹²⁸ Touted as a growth industry, mediation is expected to ease court congestion caused by the state's rapid population growth. The Family Law Section of the Florida Bar originally proposed the bill affording mediators judicial immunity.¹²⁹ The Mediation and Arbitration Committee of the Supreme Court of Florida recommended the extension of absolute judicial immunity to mediators and arbitrators in its 1987 report accompanying the proposed rules for implementing chapter 44, Florida Statutes.¹³⁰

With this encouragement, Senator Helen Gordon Davis¹³¹ and Representative James Davis¹³² introduced bills granting mediators and arbitrators judicial immunity. The initial versions of both bills remained relatively unaltered through sub-committee, committee and full floor readings.¹³³ The Senate Committee on Judiciary-Civil received no

126. *Id.* at 83.

127. A MEDIATOR'S MANUAL, *supra* note 120, at 3.

128. *Id.*

129. Judiciary-Civ. Comm. SB 155 Staff Analysis, *supra* note 123, at 3.

130. *Id.*

131. Dem., Tampa.

132. Dem., Tampa.

133. Senate Bill 237 replaced Senate Bill 155 in full committee. Senator Davis stated that the immunity provision in Senate Bill 237 was not "inconsistent" with Senate Bill 155 and recommended the substitution, which was adopted by the Senate Judiciary-Civil Committee. Fla. S. Comm. on Judiciary-Civ., tape recording of proceedings (Apr. 4, 1989) (statements of Sen. Helen Davis) (tape on file with committee).

Senate Bill 237 in all forms reads: "An arbitrator appointed pursuant to s. 44.303 or s. 44.304 or a mediator appointed pursuant to s. 44.302 shall have judicial immunity in the same manner and to the same extent as a judge." Fla. S. Comm. on Judiciary-Civ., SB 237 § 5 (1989) (Second Engrossed and Enrolled versions).

The initial version of House Bill 884 proposed extending immunity to all persons covered by sections 44.101-.306, Florida Statutes (1989). Fla. H. Comm. on Judiciary-Civ., HB 884 § 1 (Apr. 5, 1989). This proposal would have granted unqualified judicial immunity to participants in citizen dispute centers, who presently enjoy a lesser, qualified immunity under section 44.201(6), Florida Statutes (1989). Fla. H. Comm. on Judiciary-Civ., Subcomm. on Court Systems, Probate and Consumer Law, tape recording of proceedings (Apr. 5, 1989) (nature of "unqualified" immunity for court-appointed mediators and arbitrators discussed) (on file with committee). This provision was amended and citizen dispute center participants deleted in the version presented to the full committee on April 12, 1989. Fla. H. Comm. on Judiciary-Civ.,

questions on the immunity provision of Senate Bill 237,¹³⁴ nor was there discussion on the Senate floor when the bill was presented and passed unanimously by the thirty-six senators present.¹³⁵

The House Subcommittee on Court Systems, Probate and Consumer Law discussed the meaning of "unqualified" immunity in House Bill 884.¹³⁶ Laurel Landry, Assistant Director of Governmental Affairs for The Florida Bar, responded that unqualified immunity was needed to encourage participation in court-annexed programs.¹³⁷ She stated that qualified immunity would permit mediators and arbitrators to be sued and would have a corresponding chilling effect on the willingness of qualified persons to fill those roles.¹³⁸ Representative Robert Harding¹³⁹ expressed concern about extending absolute immunity to non-lawyer mediators, who are not required to pass the stringent qualification standards set forth by The Florida Bar for attorneys participating in citizen dispute programs.¹⁴⁰

Ms. Landry responded that, even though some mediators are not attorneys, the supreme court ensures their qualification to serve by requiring specific training for all court-appointed mediators and arbitrators.¹⁴¹ She stated that the grant of judicial immunity serves the following purposes: officially recognizing the mediators' judicial function in facilitating settlements; extending the quasi-judicial immunity already granted to them by case law; encouraging qualified volunteers; and alleviating the pressures on the judicial system.¹⁴² Following this discussion, the committee voted unanimously in favor of the bill.¹⁴³

tape recording of proceedings (Apr. 12, 1989) (on file with clerk) (discussion of immunity for citizen dispute and court-appointed participants).

The final draft of section 1, House Bill 884 as amended, reads: "Mediators and arbitrators appointed pursuant to ss. 44.302-44.303 shall enjoy judicial immunity in the same manner and to the same extent as full-time judicial officers." Fla. H. Comm. on Judiciary-Civ., HB 884 § 1 (1989) (as reported to clerk).

134. Fla. S. Comm. on Judiciary-Civ., tape recording of proceedings (Apr. 4, 1989) (tape on file with committee).

135. FLA. S. JOURN. 392, 393 (Reg. Sess. May 18, 1989).

136. Fla. H. Comm. on Judiciary-Civ., Subcomm. on Court Systems, Probate and Consumer Law, tape recording of proceedings (Apr. 18, 1989) (Laurel Landry, Assistant Director, Governmental Affairs, The Florida Bar, responding) (tape on file with committee).

141. *Id.*

142. *Id.*

143. *Id.* The vote was 18-0.

On May 10, 1989, the House, without discussion, unanimously passed Senate Bill 237.¹⁴⁴ The final version as passed reads: "An arbitrator appointed pursuant to s. 44.303 or s. 44.304 or a mediator appointed pursuant to s. 44.302 shall have judicial immunity in the same manner and to the same extent as a judge."¹⁴⁵

In separate interviews, Senator Davis¹⁴⁶ and Representative Davis¹⁴⁷ both indicated that their purpose in sponsoring the legislation was to attract qualified people to participate in the court-annexed arbitration and mediation programs voluntarily or for a nominal consideration. Representative Davis stated that the quality control function of the supreme court's mandatory training program would safeguard the public from improper actions by court-appointed participants.¹⁴⁸ Even though the supreme court has not yet promulgated standards of ethical conduct to complement the broad immunity provision, Representative Davis noted that the court planned to do so by the bill's January 1, 1990 effective date.¹⁴⁹

The question of whether the safeguards inherent in the mediation process are adequate was addressed by W. Kent Brown in a memorandum reviewed by the Senate Judiciary-Civil Committee.¹⁵⁰ Brown noted that the voluntariness of the agreement and the requirement of court approval serve as built-in safeguards of fairness.¹⁵¹ As a practical matter, however, he cautioned that an unfair result could occur if a mediator coerced an unwitting party to acquiesce in an agreement and a court rubber-stamped it.¹⁵² Concluding that court-ordered medi-

144. FLA. H.R. JOURN. 449 (Reg. Sess. 1989). The vote was 110-0.

145. Ch. 89-31, § 5, 1989 Fla. Laws 48, 50 (codified at FLA. STAT. § 44.307 (1989)).

146. Telephone interview with Sen. Davis (May 23, 1989) (discussing legislative intent of SB 237) (notes available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

147. Interview with Rep. Davis (May 23, 1989) (discussing legislative intent of HB 884) (tape recording available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

148. *Id.*

149. *Id.*

150. Judiciary-Civ. Comm. SB 155 Staff Analysis, *supra* note 123, at 3 (citing Brown, *Statutory Immunity for Court-Ordered Mediators and Arbitrators*, Florida Dispute Resolution Center (Mar. 30, 1989) at 2-3) (on file with committee).

151. Brown, *Statutory Immunity for Court-Ordered Mediators and Arbitrators*, Florida Dispute Resolution Center (Mar. 30, 1989) at 2-3.

152. *Id.* The role of a mediator as a fairness monitor versus an impartial intermediary has been much debated. See Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981). *But see* Stulberg, *supra* note 13.

Commentators have argued that women, who only recently have made gains in obtaining legal protection of their rights in matters of child and spousal support, property settlement and as victims of spouse abuse, will lose those dearly won rights if forced to reprivatize their divorce proceedings in mediation. Lefcourt, *National Center on Women & Family Law*, 18 NAT'L CLEARINGHOUSE REV. 266 (1984); Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 NAT'L CLEARINGHOUSE REV. 431 (1985).

ation did not provide adequate safeguards to justify abolishing an injured party's right of action against an unethical mediator, Brown recommended the promulgation of ethical standards of conduct by the supreme court and the establishment of a regulatory board to enforce them.¹⁵³ This would "parallel the judicial process whereby judges, though protected by immunity, are subject to a regulatory board."¹⁵⁴ Neither of these proposed safeguards were addressed by the Florida Legislature.¹⁵⁵

As the law now stands, mediators and arbitrators in court-annexed programs will have absolute immunity beginning in 1990. Parties to mediation and arbitration will have correspondingly inadequate safeguards to protect their rights and to ensure that trained mediators will be disciplined for nonexistent ethical code violations. The concern for obtaining qualified mediators and arbitrators was clearly expressed, but was unsupported by empirical evidence. A report from a retired Palm Beach judge¹⁵⁶ and a newspaper article¹⁵⁷ formed the basis of legislative concern. The article chronicled a law suit by an inmate, who was a party to a county court mediation settlement, against a volunteer mediator for not ensuring that his settlement check was issued in time to meet his deadline for repayment of a personal debt.¹⁵⁸ The mediator spoke of resigning from the program, as the cost of defending himself was too much to pay for volunteering his services.¹⁵⁹

The Legislature's well-intentioned desire to support Florida's emerging dispute resolution programs may have led to a hasty decision. Only time and pragmatic testing of mediator immunity in the courts will provide the answer.

153. Brown, *supra* note 151, at 8-9. The purpose of setting standards is to educate mediators and consumers on the role and function of mediators, as well as to aid in creating uniformity in mediation practice. See Bishop, *Mediation Standards: An Ethical Safety Net*, 4 MEDIATION Q. 5 (1981); see also Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984) (proposing new standards that go beyond the adversarial model codified by the American Bar Association's Model Rules of Professional Responsibility); Comment, *The Mediator—Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507 (1986) (proposing ethical goals for the attorney/mediator consistent with a non-adversarial function).

154. Brown, *supra* note 151, at 9.

155. Neither the tape recordings of committee and floor discussions nor the staff reports of the House and Senate bills contain any mention of Mr. Brown's concern.

156. Ratliff, *Quasi-Judicial Immunity for Mediators and Arbitrators* (memorandum prepared for Judge Silverman) (Oct. 19, 1988) (on file with S. Comm. on Judiciary-Civ.).

157. *No More Mr. Nice Guy*, Miami Herald, June 20, 1987, at 2PB, col. 1.

158. *Id.*

159. *Id.*

IV. CONSTITUTIONAL CONSIDERATIONS

If a challenge to the Legislature's grant of absolute immunity to mediators arises, it will most likely be predicated on article I, section 21 of the Florida Constitution, which guarantees an injured party access to the courts. This provision, provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."¹⁶⁰ This provision first appeared in similar form in the Florida Constitution's Declaration of Rights in 1838.¹⁶¹

A. *Equal Protection and Due Process Challenges*

The right of access to the courts, while not expressly guaranteed by the United States Constitution, has been found to exist in the first amendment's "petition for redress of grievances" provision, the fifth and fourteenth amendments' "due process of law" clauses, the sixth amendment's "right to a speedy and public trial" guarantee, the fourteenth amendment's "privileges and immunities" provision, and in the fourteenth amendment's "equal protection" clause.¹⁶² The United States Supreme Court has interpreted the fourteenth amendment's guarantee of equal protection to mean that all persons "should have like access to the courts of the country for the protection of their persons and property, [and] the prevention and redress of wrongs."¹⁶³

Florida courts have recognized the limitations the equal protection and substantive due process guarantees place on a state's police power. The Supreme Court of Florida has stated that "[a]ny statute enacted as an exercise of sovereign police power should, at a minimum, further a broad 'public' interest."¹⁶⁴ The exercise of police power¹⁶⁵ must apply to the general public and not favor a particular

160. FLA. CONST. art. I, § 21.

161. Note, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U.L. REV. 871, 872 (1977).

162. *Id.* at 871-72.

163. *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (prohibiting legislation that discriminates against one class in favor of another). For a discussion of how Florida courts have applied equal protection clause decisions to their interpretations of the access-to-courts guarantee, see Spence & Roth, *Closing the Courthouse Door: Florida's Spurious Claims Statute*, 11 STETSON L. REV. 283, 293-99 (1982).

164. *United Gas Pipeline Co. v. Bevis*, 336 So. 2d 560, 564 (Fla. 1976).

165. The supreme court offered the following definition:

Police power has been defined as an exercise of the sovereign right of the state to enact laws for the protection of the lives, health, morals, comfort, and general welfare of the people. . . . The police power includes anything which is reasonable, necessary, and appropriate to secure the peace, order, protection, safety, good health, comfort, quiet, morals, welfare, prosperity, convenience, and best interest of the public.

Everton v. Willard, 468 So. 2d 936, 942 (Fla. 1985), *quashed by City of North Bay Village v. Braelow*, 498 So. 2d 417 (Fla. 1986).

class;¹⁶⁶ it must be impartial and nondiscriminatory.¹⁶⁷ "Any form of state legislation creating discriminatory classifications (1) that concern fundamental constitutional rights,¹⁶⁸ or (2) whose defining criteria are inherently suspect,¹⁶⁹ or (3) that are unnecessarily restrictive and unreasonably related to the legislation's purported purpose,¹⁷⁰ is subject to challenge and examination as a denial of equal protection of the laws."¹⁷¹ An equal protection challenge is often intertwined with a substantive due process challenge, which is based on the legislature's use of its police power to unjustifiably intrude upon an individual's fundamental rights.¹⁷²

As long as a state does not infringe upon a constitutional right or contravene a federal statute, it has great latitude to regulate the conduct of its citizens.¹⁷³ For a regulation to be constitutional, the state must show that the legislation is rationally related to a legitimate state interest.¹⁷⁴ However, when a statute supported by a legitimate state purpose conflicts with a constitutional right, the court must employ a due process balancing test and require the state to show a compelling interest.¹⁷⁵ An individual's exercise of fundamental rights outweighs any legitimate state interest that is not compelling.¹⁷⁶

A state's interest in stemming the "floodtide of litigation" and assisting the courts in operating more efficiently is not sufficiently compelling to justify the denial of an individual's fundamental right to

166. *Bevis*, 336 So. 2d at 564 (citing *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949)).

167. *Id.*

168. Federal law, by implication, recognizes a right of access to courts as fundamental. See Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 249-56 (1970).

169. See *Wiggins v. City of Jacksonville*, 311 So. 2d 406, 408 (Fla. 1st DCA 1975) (finding that a Jacksonville ordinance, which granted licenses to plumbers meeting city standards but refused licenses to plumbers meeting the identical standards of nearby Atlantic Beach, violated state and federal equal protection clauses).

170. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 167-76 (1971) (finding that denial of right to illegitimate children, but not legitimate children, to recover under survival death benefits afforded by workmen's compensation laws is unconstitutional); *Rinaldi v. Yeager*, 384 U.S. 305, 308-11 (1966) (finding that requirement, which obligated incarcerated parties, but not others, to repay the cost of producing transcripts used in an unsuccessful appeal, is violative of 14th amendment).

171. *Patch Enters. v. McCall*, 447 F. Supp. 1075, 1078 (M.D. Fla. 1978) (citing *Craig v. Boron*, 429 U.S. 190, 210 & n.* (1977)) (holding that prohibition of alcoholic consumption at both bottle clubs and liquor retail establishments during certain hours was constitutional exercise of county's police power).

172. *Id.* at 1080.

173. *Id.* (citing *Bigelow v. Virginia*, 421 U.S. 809, 825 n.10 (1975)).

174. *Id.* at 1081.

175. Goodpaster, *supra* note 168, at 244.

176. *Id.* at 244-45.

seek access to the courts.¹⁷⁷ Noting the increase in the number of cases being filed, Supreme Court Justice William Brennan has asserted that "a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief . . . seems to be not only the wrong tool but also a dangerous tool for solving the problem."¹⁷⁸

This balancing test can be applied to a situation where a party is injured by a negligent act of a court-appointed mediator, who, pursuant to section 44.307, Florida Statutes, is immune from suit. Under the equal protection analysis, the state may assert the public interest of protecting mediators from the chilling effect of the threat of litigation. Arguably, this legislative action is impartial and generally applicable, as it does not create a discriminatory classification.

Applying the due process analysis, one can argue that granting absolute immunity to court-appointed mediators conflicts with the exercise of a state citizen's constitutional right of access to the courts. The Legislature's dual purposes of recruiting volunteers and easing the caseload of the courts may not be sufficiently compelling to justify denial of a constitutional right. On the other hand, the purported chilling effect of threatened law suits against volunteer mediators may justify the grant of immunity. Empirical evidence should be required, however, to show that a chilling effect actually exists.

B. State Constitutional Challenges

A challenge to statutory immunity for mediators may also be predicated upon the access-to-courts guarantee of the state constitution. In

177. *Stewart v. Gilliam*, 271 So. 2d 466, 475 (Fla. 4th DCA 1972). Other interests that may be proffered by the state as compelling—"the discouragement of frivolous, malicious, or harassing litigations; fairness to opponents; the protection of existing interests, and economy for the state"—are considered insufficient when balanced against a constitutional right. Note, *supra* note 161, at 904-05 n.216.

178. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Florida courts have applied the United States Supreme Court analysis of the equal protection clause and substantive due process clause to cases alleging article I, section 21 violations. The Supreme Court of Florida in *State v. Lee*, 356 So. 2d 276 (Fla. 1978), held chapter 77-468, section 42(5), Florida Statutes, unconstitutional on the grounds that it arbitrarily took fines paid by traffic violators and paid them to a restricted class of private individuals designated by law as "good drivers." *Id.* at 278 (citing ch. 77-468, § 42(5), 1977 Fla. Laws 2057, 2087-88). The court stated that the statute created an irrational classification. *Id.*

In *Quicker v. City of Fort Lauderdale*, 354 So. 2d 400 (Fla. 4th DCA 1978), the Fourth District Court of Appeal held that the city's application of age provisions in initial and subsequent pension plans arbitrarily and irrationally discriminated against certain employees. *Id.* at 403. The initial pension plan only covered employees under the age of fifty-four years and six months. The replacement plan had no age restrictions, but covered only future employees and those who were covered under the prior plan. *Id.* at 402. This meant that employees, like Mr. Quicker, who were ineligible under the initial plan's age limit, were also ineligible under the new plan. *Id.* A fifty-five year old new employee, on the other hand, would be eligible. *Id.* The court found no rational basis for retaining the age restriction. *Id.* at 403.

Kluger v. White,¹⁷⁹ the Supreme Court of Florida addressed the issue of legislative modification or abolishment of common law remedies in relation to the Florida Constitution's guarantee of access to the courts.¹⁸⁰ The court weighed the state's purpose of enacting legislation to meet society's changing needs against the protection of an individual's fundamental rights.¹⁸¹ The court held that where a right of access to the courts has been provided by a statute predating the adoption of Florida's Declaration of Rights in 1968, or where such right has become a part of the common law,¹⁸² the Legislature may not abolish such right without providing an adequate alternative to protect those rights, unless an overpowering public necessity exists which no available alternative method can meet.¹⁸³ Under this criterion, the courts have held that granting immunity to administrative agencies established after 1968 is a constitutional exercise of the state's police power.¹⁸⁴

Courts have found the following to be adequate alternative remedies: worker compensation laws replacing a common law cause of action against a negligent employer with a statutory remedy;¹⁸⁵ a mandatory medical malpractice law requiring a claimant to submit his

179. 281 So. 2d 1 (Fla. 1973).

180. *Id.* Section 627.738, Florida Statutes, abolished tort actions for automobile accidents where property damage suffered did not exceed \$550. *Id.* Kluger was involved in an automobile accident with damages of \$250 (less than the statutorily mandated \$550). *Kluger*, 281 So. 2d at 2-3. The Supreme Court of Florida found that the legislation was an unconstitutional abolition of Kluger's fundamental right of access to the courts to seek redress for an existing common law tort. *Id.* at 5. The court also found no overwhelming public necessity to justify the Legislature's abolition of this right. *Id.* The court reasoned that the alternative remedy—the option to purchase collision insurance or act as one's own insurer—was not an adequate substitute for the right to sue in tort. *Id.*

For an analysis of the *Kluger* decision, see Comment, *Insurance—No-Fault Automobile Property Protection—Legislature's Abrogation of Common Law Tort Right to Recover Property Damage of Less Than \$550 Violates Florida Constitution*, 2 FLA. ST. U.L. REV. 178 (1974); Comment, *Insurance: Does Florida's No Fault Law Comply with the Constitutional Right of Access to Courts?* 35 U. FLA. L. REV. 194 (1983).

181. *Kluger*, 281 So. 2d at 5.

182. An alternative remedy must be provided only for actions provided by statutory or common law predating the 1968 adoption of the state constitution. See *Harrell v. State, Dept. of Health and Rehab. Servs.*, 361 So. 2d 715, 718 (Fla. 4th DCA 1978).

183. *Kluger*, 281 So. 2d at 4. Section 2.01, Florida Statutes, provides for the adoption of the common laws of England as part of the state statutory law predating the 1968 adoption of the Declaration of Rights. FLA. STAT. § 2.01 (1989).

184. *Caloosa Property Owners Ass'n v. Palm Beach County Bd.*, 429 So. 2d 1260, 1267 (Fla. 1st DCA) (holding that existing development of regional impact review process predating the adoption of the Declaration of Rights poses no access to courts problem), *review denied*, 438 So. 2d 831 (Fla. 1983); *Fernandez v. Florida Ins. Guarantee Ass'n*, 383 So. 2d 974, 976 (Fla. 3d DCA) (holding that curtailing actions against legislatively created agencies is a permissible legislative act), *review denied*, 389 So. 2d 1109 (Fla. 1980).

185. See *Kluger*, 281 So. 2d at 4.

case to a mediation panel before court review;¹⁸⁶ and no-fault automobile insurance legislation.¹⁸⁷ The Supreme Court of Florida has listed typical examples of reasonable restrictions to include statutes of limitation and repose,¹⁸⁸ payment of reasonable cost deposits,¹⁸⁹ conversion of an action against a private individual into an action against a state agency,¹⁹⁰ and the suspension of libel actions against newspapers until they have exercised their right of retraction.¹⁹¹

Courts also have leniently interpreted the "overpowering public necessity" requirement set forth in *Kluger*. Examples of actions abolished by the Legislature under this power are claims based on alienation of affection, criminal conversation, seduction, and breach of promise to marry.¹⁹² The Supreme Court of Florida upheld the legislative abolishment of these actions based on the Legislature's plenary power to regulate the marriage relationship from which these actions arose.¹⁹³

More recently, courts have construed the Legislature's legitimate exercise of its police power, based on a clearly stated legislative finding of public necessity, to include the enactment of statutes of repose on claims against architects and contractors for negligent design¹⁹⁴ and on medical malpractice claims based on a legislative finding of a medical malpractice insurance crisis in the state.¹⁹⁵ However, the supreme court found the legislatively imposed cap on noneconomic damages under section 59 of the Tort Reform and Insurance Act,¹⁹⁶ unjustified under the state's police power.¹⁹⁷ The court concluded that restricting a claimant who had received a \$1,000,000 jury verdict to \$450,000 was an arbitrary, unconstitutional abolition of his right of redress of inju-

186. See *Carter v. Sparkman*, 335 So. 2d 802, 807 (Fla. 1976).

187. See *Chapman v. Dillon*, 415 So. 2d 12, 17 (Fla. 1982) (providing a reasonable alternative to a tort action by guaranteeing injured party prompt payment for most expenses, albeit not full expenses).

188. See *Carr v. Broward*, 541 So. 2d 92 (Fla. 1989).

189. See *Carter*, 335 So. 2d at 805.

190. See *White v. Hillsborough County Hosp. Auth.*, 448 So. 2d 2 (Fla. 2d DCA), *appeal dismissed*, 443 So. 2d 981 (Fla. 1983); see also *Perl v. Omni Int'l of Miami, Ltd.*, 439 So. 2d 316, 317 (Fla. 3d DCA 1983) (holding that making all communication in unemployment compensation hearing absolutely privileged did not abolish common law cause of action for defamation).

191. *Carter*, 335 So. 2d at 805.

192. *Rotwein v. Gersten*, 36 So. 2d 419, 420-21 (Fla. 1948).

193. *Id.* at 421.

194. *American Liberty Ins. Co. v. West and Conyers*, 491 So. 2d 573, 575 (Fla. 2d DCA 1986).

195. *Carr v. Broward*, 541 So. 2d 92 (Fla. 1989).

196. FLA. STAT. § 768.80 (Supp. 1986).

197. *Smith v. Department of Ins.*, 507 So. 2d 1080, 1095 (Fla. 1987).

ries.¹⁹⁸ The court stated that if the Legislature could bypass the requirements of *Kluger*, then the constitutional right of redress for injuries "would be subordinated to, and a creature of, legislative grace or . . . 'majoritarian whim.'"¹⁹⁹

Applying the *Kluger* test to the statutory immunity granted to court-appointed mediators, one could argue that the Legislature has clearly abolished a mediator's right of redress for an action based on tort, contract or fiduciary theories without providing an alternative remedy. Two responses may be made to this challenge. First, because court-annexed mediation programs were enacted after the 1968 adoption of the Declaration of Rights, the Legislature did not abolish a pre-existing right. Second, the Legislature has met the "overpowering public necessity" requirement of *Kluger*, as the stated purpose of the immunity provision is to recruit and retain qualified mediators who would not participate without liability protection.

However, in addition to demonstrating a valid public policy argument, *Kluger* requires that no alternative remedy be available to protect the foreclosed right. The Legislature might have established a compensation trust fund for injured parties; it might have provided malpractice insurance for court-appointed mediators; or it could have postponed the enactment of the legislation until the supreme court had promulgated an ethical code of professional conduct for mediators and established a regulatory board to enforce the code as a means of protecting a mediator's right of redress. The Legislature considered none of these actions.

V. CONCLUSION

Mediation is an ancient form of dispute resolution common to a wide variety of cultures. Faced with ever-increasing judicial case loads and a public demand for speedier, more flexible means of resolving private conflicts, Congress and states such as Florida have implemented court-annexed mediation programs. Many of these programs are patterned on a citizen dispute center model, relying on volunteer or nominally paid mediators.

In an effort to recruit and retain qualified participants for Florida's program, the 1989 Legislature passed a measure providing absolute judicial immunity to court-appointed mediators. Federal case law supports judicial immunity for quasi-judicial officers performing judicial functions when adequate safeguards exist to protect a person's consti-

198. *Id.*

199. *Id.* at 1089.

tutional rights. The legislative staff analysis, prepared in response to the proposal of absolute immunity for mediators, indicates that a mediator performs a quasi-judicial function and that the threat of a law suit from disappointed parties supports the need for immunity; it also suggests that the built-in safeguards of the parties' retaining final decisional authority over their agreement coupled with judicial review and approval of mediated agreements are sufficient protection of a mediator's constitutional rights.

The Legislature considered very little empirical evidence supporting the assertion that the possibility of being sued was discouraging mediators from participating in court-annexed programs. In addition, the Legislature's reliance on safeguards built into mediation may be misplaced. A code of professional ethics enforced by a regulatory board with appropriate powers is needed. These measures would provide safeguards analogous to the judicial code of ethics and disciplinary procedures already in place for judges.

The effect of this legislation is to abolish a mediator's constitutional right of access to the courts without providing an alternative remedy. Under the *Kluger* analysis, this abolition is permissible only where the cause of action was created after the adoption of the Declaration of Rights in 1968, or where an overwhelming public purpose exists and no alternative remedy is available to protect the citizen's right of redress for personal injury. Because Florida's court-annexed mediation programs were legislatively established in 1987, the exception to the *Kluger* rule operates to empower the Legislature's action. Arguably, the Legislature has the obligation to provide an alternative means of redress, such as a personal injury trust fund or liability insurance for court-annexed programs. Additionally, the supreme court is statutorily obligated to promulgate disciplinary rules and procedures.

In its haste to support Florida's fledgling mediation program, the Legislature has granted broad protections to one class—court-appointed mediators—and completely ignored the protections of another—the parties to mediation. The Legislature should rectify this imbalance by adopting adequate safeguards.

